OFFICE OF THE GENERAL COUNSEL

MEMORANDUM 79-22 April 9, 1979

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: John S. Irving, General Counsel

SUBJECT: Detroit Edison Co. v. N.L.R.B. Sup. Ct. No. 77-968, 100 LRRM 2728, 85 LC ¶11,129

On March 5, 1979, the Supreme Court, by a 5-4 vote, held that, while the employer was barred by Section 10(e) from challenging the probable relevance to pending grievances of the actual test questions and answer sheets of an aptitude test which had been administered to job applicants, the Board abused its remedial authority in requiring that these materials be furnished to the union directly, rather than to an industrial psychologist selected by the union (as the employer had proposed). By a 6-3 vote, the Court further held that the employer did not violate its bargaining obligation under Section 8(a)(5) by offering to disclose test scores linked with the employee names only upon receipt of consents from the examinees. Accordingly, the Supreme Court vacated the judgment of the court of appeals enforcing the Board's order and remanded the case to that court for further proceedings consistent with its opinion.

Although the Detroit Edison case may ultimately be confined to its precise facts, the opinion and its rationale lead me to conclude that, at a minimum, Regional Offices must expand the scope of the investigation of cases involving a refusal to furnish information. In this regard, I note particularly two pertinent observations of the Court:

> A union's bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the manner requested. (100 LRRM at 2733, 85 LC at 20,417, slip. op. at p. 12.)
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> The Board's position appears to rest on the proposition that union interests in arguably relevant information must always predominate over all other interests, however legitimate. But such an absolute rule has never been established, and we decline to adopt such a rule here. There are situations in which an employer's conditional offer to disclose may be warranted. (100 LRRM at 2734, 85 LC at 20,419, slip. op. at p. 16.)

Thus, a Region cannot confine its investigation to the issue of relevance. Even if such relevance is found or conceded, charged party may contend that the information is confidential, sensitive, or otherwise privileged against disclosure in the form in which it was requested. 1/ In such circumstances, the Region must investigate the facts concerning this defense and must make a determination as to whether the charged party has a "legitimate and substantial" 2/ interest in not supplying the information in the form requested by the other party. If there is such a legitimate and substantial interest or justification, the Region must then make a further determination as to whether the charged party made a reasonable and good faith offer to accommodate the other party's need for the relevant information with its own legitimate and substantial interest in protecting the information (e.g. by offering to supply the information in some other form or manner). If the charged party's interest is legitimate and substantial and the charged party has made a reasonable and good faith offer to accommodate, charged party would be considered to have satisfied its statutory obligation. On the other hand, if the interest is not legitimate and substantial and/or if there has been no reasonable and good faith offer to accommodate, complaint should issue, absent settlement. 3/

With particular reference to those cases where charged party claims that the furnishing of information would breach a pledge of confidentiality made to a third party, the Region should first determine, of course, that the information is relevant to collective bargaining purposes. Assuming that there is such relevance, the Region must then consider the following factors:

1. Is the information of a sensitive nature?

2. Was the pledge of confidentiality made for the lawful purpose of protecting confidentiality or, on the contrary, was it made "to further parochial concerns or to frustrate subsequent union attempts to process employee grievances."? 4/

3. Was the pledge of confidentiality violative of the terms of the collective bargaining agreement?

4. Did the charged party offer to disclose the information upon consent of the person to whom confidentiality was pledged?

1/ Although Detroit Edison involved an employer's claim of privilege against disclosure, the principles enunciated therein appear to apply also to a similar claim by a union.

2/ 100 LRRM at 2733, 85 LC at 20,417, slip. op. at p. 13.

3/ If the interest is legitimate and substantial, and the charged party has not made a reasonable and good faith offer to accommodate, the Region should seek a remedy that would accommodate the charged party's interest and the other party's need for the information.

4/ 100 LRRM at 2735, 85 LC at 20,419, slip. op. at p. 17.

A. Assuming that charged party made the aforementioned offer, did the other party seek to obtain such consent?

B. If the other party did not seek such consent, was there a valid excuse for not doing so, e.g. it would be too burdensome or futile to seek such consent? In this regard, it should be noted that, according to the Supreme Court, the union in Detroit Edison had only to seek the consent of the very persons whose grievance was being processed, a task which was not burdensome. (Sl. op. 17)

C. If the other party seeks the consent of the persons to whom confidentiality was pledged and does not secure consent, does its need for the information in the form requested outweigh the interest in protecting confidentiality?

If the Region has substantial questions concerning the resolution of any of the issues discussed herein, it should submit the case involving these questions to the Division of Advice.

J. S. I.

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